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No. 89-1298

IN THE
Supreme Court of the United States
OCTOBER TERM, 1989

INGERSOLL-RAND COMPANY,
Petitioner,

v.

PERRY McCLENDON
Respondent.

On Writ of Certiorari to the Supreme Court of Texas

BRIEF OF THE WASHINGTON LEGAL FOUNDATION AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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QUESTION PRESENTED

Whether the Employee Retirement Income Security Act of 1974 ("ERISA") preempts a state common law claim that an employer has unlawfully discharged an employee in order to interfere with his attainment of benefits under an ERISA-covered benefit plan.

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BRIEF OF THE WASHINGTON LEGAL FOUNDATION AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

INTEREST OF THE *AMICUS CURIAE*

The Washington Legal Foundation (WLF) is a national nonprofit public interest law and policy center with more than 125,000 members and supporters nationwide. While WLF engages in litigation and the administrative process in a variety of areas, WLF devotes a substantial amount of time to advancing the interests of the free enterprise system, and the economic and civil liberties of individuals and businesses. To this end, WLF has appeared as *amicus curiae* before this Court as well as other state and federal courts in cases affecting business. *See, e.g., Pacific Mutual Life Ins. Co. v. Haslip*, No. 89-1279 (decision pending 1990);

Kansas and Missouri v. Utilicorp United Inc., No. 88-2109 (decision pending 1990); *H.J., Inc. v. Northwestern Bell Telephone Co.*, 109 S.Ct. 2893 (1989); and *Pacific Gas & Electric Co. v. Public Utilities Commission of California*, 475 U.S. 1 (1986).

In addition to its interest in issues affecting the free enterprise system, WLF devotes a substantial amount of time to issues relating to the proper interrelationship between the national and state governments. WLF believes that both the national and state governments have important roles to play in our federal system of government. WLF has appeared as *amicus curiae* before this Court on a number of occasions recently to urge that state and local governments be granted greater autonomy in their dealings with the national government. *See, e.g., Howlett v. Rose*, ___ U.S. ___ (June 11, 1990); *Pennsylvania Department of Public Welfare v. Davenport*, 58 U.S.L.W. 4610 (May 29, 1990); *United States v. Spallone*, 110 S.Ct. 625 (1990). Nontheless, WLF believes that there are some policy matters that require uniform treatment nationwide and thus should be delegated exclusively to the national government.

WLF believes that regulation of employee benefits issues is, in light of the nationwide character of many corporate employers, one policy matter that should be handled by the national government to the exclusion of state and local governments. WLF believes that the confusion that would be engendered by permitting each of the 50 states and the District of Columbia to adopt its own set of employee benefits regulations would be a significant deterrent to the creation and maintenance of employee benefit plans.

WLF is filing this brief because of its interest in promoting the efficient working of the free enterprise

system and the welfare of the consuming public. Because WLF advocates maintaining a meaningful role for states in our federal system of government but at the same time advocates an exclusive role for the national government in the issues raised by this case, WLF believes that it can provide the Court with a unique perspective that may be of assistance to the Court in resolving this matter.

WLF submits this brief on behalf of Petitioner with the written consent of both parties.

STATEMENT OF THE CASE

WLF is, in the interest of brevity, omitting any detailed statement of the facts of this case. WLF adopts by reference the statement of facts contained in Petitioner's brief.

In brief, Respondent Perry McClendon worked as a salesperson and distributor of construction equipment for Petitioner Ingersoll-Rand Co. more or less continuously between 1972 and 1982. Ingersoll-Rand suffered a severe slowdown in its business in 1982; as a result, it terminated Mr. McClendon's employment in the fall of 1982 as part of a company-wide reduction-in-force.

Mr. McClendon concluded that at the time he was terminated, he was four months shy of vesting under Ingersoll-Rand's pension plan; he further concluded that he had been terminated for the express purpose of preventing him from becoming vested. Accordingly, he filed suit against Ingersoll-Rand in Texas state court, asserting a state-law wrongful termination claim. The lawsuit sought as remedies lost commissions, lost pen-

sion and other benefits, damages for emotional distress, and punitive damages.[1]

The trial court granted summary judgment to Ingersoll-Rand, and the court of appeals affirmed. However, in a 5-4 decision the Texas Supreme Court reversed and remanded. *McClendon v. Ingersoll-Rand Co.*, 779 S.W.2d 69 (Tex. 1989). It recognized that "Texas courts have traditionally followed the employment-at-will doctrine which allows that employment for an indefinite term may be ended at will and without cause." Pet. App. 3a. Nonetheless, the court announced (for the first time) that a cause of action lies under Texas common law against an employer whose "principal reason" for terminating an employee is to avoid contributing to or paying benefits under the employee's pension fund. *Id.* at 5a. The court further concluded that § 514 of the Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. § 1144, does not preempt such a state common-law cause of action. *Id.* at 5a n.3. The court remanded the case for trial. This Court granted a writ of *certiorari* to consider whether Mr. McClendon's state common-law cause of action is preempted by ERISA.

SUMMARY OF ARGUMENT

A fair reading of § 514 of ERISA makes clear that Congress intended to preempt state laws of the type that Respondent is attempting to invoke in this case. Petitioner's thorough analysis in its brief of ERISA's language and legislative history convincingly makes the argument for preemption.

[1] In fact, Ingersoll-Rand asserts that Mr. McClendon was fully vested under the pension plan at the time of his termination. Accordingly, Ingersoll-Rand has never contested Mr. McClendon's claim to pension benefit entitlement. However, all damage claims other than Mr. McClendon's claim for pension benefits are still at issue in this case.

Rather than repeating those arguments in full in this brief, WLF focuses instead on a discussion of the proper roles of national and state governments in our federal system of government. An appropriate view of federalism recognizes that both national and state governments have important roles to play. Experience has taught that certain matters are best left to the control of state government; given the centuries-old nature of that experience, the Court will not lightly find that Congress (the final arbiter of the extent of the states' role in governing) has decided to divest the states of such control. On the other hand, experience has also taught that other matters are best left to the control of the national government. Indeed, 18th-century Americans learned very quickly (through their experiences under the Articles of Confederation) the disadvantages of overly decentralized authority. Based on that experience, the Framers of the Constitution carved out significant areas in which the national government was to play the dominant or exclusive role. Accordingly, the Framers could not accurately be described as hostile to the idea of federal preemption.

In light of that history, a generalized antipathy toward federal preemption of state law is unwarranted. While the Court has wisely been cautious in finding federal preemption of state laws affecting matters traditionally regulated by state government, there is no reason to resist a finding of federal preemption in matters (as here) having no such tradition. Texas has had no history of regulating employee benefits plans; indeed, the state common-law cause of action now before the Court was recognized for the first time by the Texas Supreme Court in this very case.

This Court has repeatedly recognized, in past decisions involving ERISA, Congress' intent to broadly preempt any and all state laws that "relate to" an employee benefit plan. By any common sense definition, the Texas common-law cause of action being asserted by Respondent clearly "relate[s] to" Petitioner's employee benefit plan. In the absence of any "federalism" concerns cautioning against preemption, the Court should not hesitate to find preemption in this case.

ARGUMENT

I. A FINDING OF PREEMPTION IN THIS CASE IS CONSISTENT WITH A PROPER VIEW OF THE RELATIONSHIP BETWEEN STATE AND NATIONAL GOVERNMENTS

State governments unquestionably have an important role to play in our federal system of government. Nonetheless, there can be no dispute that ultimately -- under the Supremacy Clause, U.S. Const., art. VI, cl. 2 -- it is for the national government to decide just how large a role the states are to play in any given issue. The national government is free to go so far as to preempt all state jurisdiction over an issue, so long as its actions are consistent with the Tenth Amendment.

Whether the national government has preempted all state jurisdiction over a given issue "fundamentally is a question of congressional intent." *English v. General Electric Co.*, ___ U.S. ___, 58 U.S.L.W. 4679, 4681 (June 4, 1990); *Schneidewind v. ANR Pipeline Co.*, 485 U.S. 293, 299 (1988). In practice this Court often has had great difficulty in discerning that intent, particularly when Congress has not made known its intent through explicit statutory language. Accordingly, the Court has

often resorted to various presumptions to assist itself in discerning Congressional intent. For example, in *California v. ARC America Corp.*, 109 S.Ct. 1661, 1665 (1989), the Court said that in light of the long tradition of state regulation of monopolies and unfair business practices, it would presume that Congress had not intended to preempt such regulation in the absence of "clear" evidence to the contrary.

Such presumptions against preemption are entirely appropriate in cases involving areas of the law with a long tradition of state government involvement. It is appropriate for the Court to presume that Congress is aware of the extent of such involvement and would not intend to upset *sub silento* the existing "federal-state balance" to such a great degree. *Jones v. Rath Packing Co.*, 430 U.S. 519, 525 (1977). *Cf. Pennhurst State School and Hospital v. Halderman*, 451 U.S. 1, 16-17 (1981)(in interpreting a federal statute, there is a presumption that Congress will not implicitly impose massive financial obligations on the states).

However, there is no logical basis for the presumption espoused by Respondent: that "preemption of state law by a federal statute is not favored in the absence of persuasive reasons."[2] Respondent's Brief in Response to Petition for Writ of Certiorari at 10. Indeed, the historical record suggests that such a sweeping presumption is wholly unwarranted; the Framers of the

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[2] Respondent bases his assertion on *dicta* from two Court decisions: *Chicago & North Western Transportation Co. v. Kalo Brick & Tile Co.*, 450 U.S. 311, 317 (1981); and *Florida Lime & Avocado Growers, Inc. v. Pall*, 373 U.S. 132, 142 (1963). Neither case explains why federal preemption of state law should as a general proposition be disfavored. Recent Court decisions dealing with federal preemption issues have displayed no similar antipathy to federal preemption.

Constitution, rather than looking with disfavor on federal preemption of state laws, recognized that under our federal system of government there were certain fields that could be regulated most appropriately by the national government on an exclusive basis.

A. The Framers of the Constitution Intended That Both the State and National Governments Should Play a Significant Role in Our Federal System of Government, and Recognized That Exclusive Control by the National Government Was Wholly Appropriate in Certain Areas

The American experience in the years preceding ratification of the U.S. Constitution demonstrated to the Framers the need to assign a strong role to the national government in our federal system. The 1781 Articles of Confederation gave the individual states primacy in any state-national government conflicts. Article II of the Articles of Confederation stated, "Each state retains its sovereignty, freedom and independence, and every Power, Jurisdiction and right, which is not by this confederation expressly delegated to the United States, in Congress assembled."

Many leaders of the era -- both inside and outside the Confederation government -- perceived the Confederation as flawed. The Confederation was beset with three major problems, none of which it was able to deal with effectively: stagnation and depression in parts of the country; the threat of debt and paper money to a sound financial structure; and diplomatic interference from abroad. C. Rossiter, *1787: The Grand Convention*, 42-47 (1987). Moreover, the national government was unable to deal with conflicts that arose among the states in the areas of commerce and finance. A. McLaughlin,

The Confederation and the Constitution, 1783-1789, 53-107 (1905). On the eve of the 1787 constitutional convention, James Madison described the flaws in the Confederation as follows:

> the want of authy. in Congs. to regulate Commerce had produced in foreign nations particularly G.B. a monopolizing policy injurious to the trade of the United States and destructive to their navigation. [The] same want of a general power over Commerce led to an exercise of this power separately, by the States, which not only proved abortive, but engendered rival, conflicting and angry regulation.

M. Ferrand, *The Records of the Federal Convention*, vol. 3 at 547.

The 1787 convention, which proposed ratification of a new constitution, was by and large a victory for those who viewed a strong national government as a solution to the problems that had plagued the Confederation, albeit advocates of strong state governments won some concessions. Rossiter at 263-65. Article I, Section 8 enumerated a long list of specific powers delegated to the new national government. Among those provisions were several that made clear that Congress was to exercise certain powers to the exclusion of state governments. Most prominently, Clause 3 granted to Congress power to "regulate commerce with foreign nations, and among the several States." Congress was also granted exclusive power to establish uniform naturalization and bankruptcy laws (Clause 4), to coin money and to fix standards of weights and measures (Clause 5), to declare war (Clause 11), and to raise an army and navy (Clauses 12 and 13). Moreover, Article I, Section 10 prohibited the states from entering into

any treaty, alliance, or confederation; coining money; emitting bills of credit; and (without the consent of Congress) laying duties on exports or imports, keeping troops or warships in peacetime, engaging in war, and entering into any agreement or compact with another state.

The Constitution as ratified also granted to Congress several open-ended powers that ensured the national government's supreme position in the federal system. Article I, Section 8, Clause 18 granted to Congress the power to "make all Laws which shall be necessary and proper for carrying into Execution" the powers vested in the national government by the Constitution. Most importantly, Article VI, Clause 2 made the Constitution, laws adopted by Congress pursuant to the Constitution, and treaties "the supreme Law of the Land." Advocates of strong state governments were able to win the adoption of the Tenth Amendment, which provides, "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."[3]

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[3] WLF does not mean to minimize the importance of the role of states in our federal system. Even Alexander Hamilton, a supporter of a strong national government, stated:

> [T]he state governments would clearly retain all the rights of sovereignty which they before had, and which were not by that act, *exclusively* delegated to the United States.

Hamilton, *The Federalist*, No. 32 (emphasis in original). But Hamilton's statement is nonetheless strong evidence that the Founding Fathers understood that the national government was to exercise sole authority over certain subject matters.

Thus, the idea that Congress would legislate over particular subject matters -- particularly in the areas of interstate commerce and foreign affairs -- to the exclusion of state governments was not at all foreign to the Founding Fathers. There is simply no reason to presume that Congress, when it is legislating in areas other than those traditionally subject to state regulation, does not intend to preempt state laws covering those same areas. Rather, the question of congressional intent should be decided solely by reference to the language of Congress' enactments.

B. Given the Absence of Previous Texas Regulation of Employee Benefit Plans, There Is No Reason To Apply Any Presumption Against Preemption in This Case

As noted above, it is entirely appropriate for the Court to apply rebuttable presumptions against Congressional intent to preempt state law in cases involving areas of the law with a long tradition of state government involvement. But no such tradition surrounds the Texas law at issue in this case.

Respondent seeks to impose liability on Petitioner based on a state common-law cause of action that prohibits an employer from discharging an employee in order to avoid contributing to or paying benefits under the employee's pension fund. Respondent, however, is unable to cite to any history of judicial regulation of such conduct by employers, for one simple reason: the Texas Supreme Court did not first recognize the cause of action in question until this very case. Indeed, the Texas court cited the adoption of ERISA as demonstrating the importance of pension benefits and thereby justifying its recognition of the new cause of action. Pet. App. 5a. It cannot seriously be contended that

Texas' regulation of this subject matter preceded adoption of ERISA's preemption provisions, given that ERISA itself is cited as one basis for that regulation.

Nor can Respondent contend that Texas has a long tradition of regulating employee discharges. Texas' tradition has been one of minimal involvement in that subject matter. As the Texas Supreme Court recognized in this case, "Texas courts have traditionally followed the employment-at-will doctrine which allows that employment for an indefinite term may be ended at will and without cause." *Id.* at 3a.

In summary, the Court need not be guided in this case by concerns that a federal preemption finding will unduly interfere with states' perogatives in an area traditionally subject to state government regulation. Rather, the Court's search for congressional intent should focus solely on the language of the preemption provisions of ERISA. *See Landreth Timber Co. v. Landreth*, 471 U.S. 681, 685 (1985).

C. Congress Intended, in Adopting ERISA, to Preempt State Laws Such as That Applied by Texas in This Case

An appropriate respect for our federal system of government includes a recognition that once Congress has expressed its intent to preempt state laws in a particular field, it must prevail -- regardless how strongly a state may feel about enforcement of its laws. *Fidelity Federal Savings and Loan Assoc. v. de la Cuesta*, 458 U.S. 141, 153 (1982). Congress may express its intent to preempt state law explicitly through explicit statutory language. Or it may express that intent implicitly -- either by establishing a regulatory scheme so pervasive that it can be said to occupy the

field, or by establishing a scheme that directly conflicts with state law. *English v. General Electric Co.*, 58 U.S.L.W. at 4681.

In adopting ERISA, Congress made explicit its intent to preempt state laws such as that at issue in this case. ERISA contains an explicit, broadly worded preemption provision:

> Except as provided in subsection (b) of this section [not applicable to this case], the provisions of this subchapter and subchapter III of this chapter shall supersede any and all State laws insofar as they may now or hereafter relate to any employee benefit plan...

ERISA § 514(a), 29 U.S.C. § 1144(a). This Court has repeatedly given an expansive reading to § 514(a), finding that it conveys Congress' intent to "establish pension plan regulation as exclusively a federal concern." *Alessi v. Raybestos-Manhattan, Inc.*, 451 U.S. 504, 523 (1981). The Court has given the phrase "relate to" in § 514(a) "its broad common-sense meaning, such that a state law 'relate[s] to' a benefit plan 'in the normal sense of the phrase, if it has a connection with or reference to such a plan.'" *Metropolitan Life Ins. Co. v. Massachusetts*, 471 U.S. 724, 739 (1985), *quoting Shaw v. Delta Air Lines, Inc.*, 463 U.S. 85, 97 (1983).

In light of Petitioner's exhaustive consideration of § 514 in its brief, WLF will not revisit issues raised in that brief. Nonetheless, WLF wishes to make several observations relevant to the Court's determination of § 514's applicability in this case.

1. ERISA itself creates a federal cause of action applicable to the allegations raised by Respondent in

this case. *See* ERISA § 510, 29 U.S.C. § 1140 ("It shall be unlawful for any person to discharge, fine, suspend, expel, discipline, or discriminate against a participant . . . for the purpose of interfering with the attainment of any right to which such participant may become entitled under the plan. . ."). It follows that if Congress thought it appropriate to include within ERISA a prohibition against discharging employees for the purpose of interfering with the employee's attainment of pension rights, Congress believed that such actions "relate to" employee benefit plans. Accordingly, it is difficult to comprehend how, as asserted by Respondent, a state law prohibiting identical conduct does not similarly "relate to" employee benefit plans within the meaning of ERISA § 514.

2. The Court has made clear that it will not preempt all state laws that have any effect on a preempted federal field, without regard to the size of the effect. Rather, no preemption will be found where the effect is "remote" and "tangential." *English v. General Electric Co.*, 58 U.S.L.W. at 4683. However, the Texas law at issue in this case cannot escape preemption under that standard, because its effects on employee benefit plans is substantial.

For example, the Texas cause of action exposes employers who maintain such plans to huge punitive damage claims, a type of claim not available in a suit brought under § 510 of ERISA. The introduction of new remedies against employers alleged to have discharged employees in order to prevent the vesting of pension rights has a significant impact on the enforcement scheme set forth in ERISA. As this Court noted in *Pilot Life Ins. Co. v. Dedeaux*, 481 U.S. 41, 107 S.Ct. 1549, 1556 (1987), "the detailed provisions of § 502(a) [of ERISA, which creates a cause of action for

violations of § 510] set forth a comprehensive civil enforcement scheme that represents a careful balancing of the need for prompt and fair claims settlement procedures against the public interest in encouraging the formation of employee benefit plans."[4] To permit Texas to impose a new cause of action and new remedies against employers found to have violated § 510 would upset the "careful balancing" undertaken by ERISA. It is quite plausible to envision employers declining to create new employee benefit plans or dissolving existing plans to avoid facing the potential liabilities created under Texas law. Such results run counter to Congress' design to encourage the formation of employee benefit plans.

3. This Court has not hesitated in the past to find ERISA preemption of state laws regulating the discharge of employees. In *Metropolitan Life Ins. Co. v. Taylor*, 107 S.Ct. 1542 (1987), the Court held that an employee's suit filed in state court alleging, among other things, wrongful termination in violation of state law for the purpose of avoiding liability under a disability

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[4] Accordingly, the Court in *Pilot Life* held that state law causes of action based on allegedly improper processing of pension benefit claims were preempted by ERISA. The Court said:

> The expectations [of Congress] that a federal common law of rights and obligations undeer ERISA-regulated plans would develop, indeed, the entire comparison of ERISA's § 502(a) to § 301 of the [Labor-Management Relations Act of 1947, 29 U.S.C. § 185(a), under which a federal common law of labor relations has developed] would make little sense if the remedies available to ERISA participants under § 502(a) could be supplemented or supplanted by varying state laws.

Pilot Life Ins. Co., 107 S.Ct. at 1558.

insurance contract was properly removable to federal court. The Court found that the state-law wrongful termination claim was preempted by ERISA and held that where Congress has so completely preempted a particular area of the law, any civil complaint raising claims in that area "is necessarily federal in character" and thus removable to federal court. *Id.* at 1546.

4. In arguing against preemption in this case, Respondent relies on *Fort Halifax Packing Co. v. Coyne*, 482 U.S. 1, 107 S.Ct. 2211 (1987). Respondent's Brief in Response to Petition for Writ of Certiorari at 8, 14. That reliance is misplaced. In *Fort Halifax*, the Court noted that ERISA § 514 preempts state laws relating to "employee benefit plans," not those (as in *Fort Halifax*) relating merely to "employee benefits." The Court held that a Maine law requiring employers closing plants to provide severance pay to its employees related merely to "employee benefits" and not to "employee benefit plans" because the employer in question had no plan providing for severance benefits and was not required by the Maine law to establish such a plan unless and until it closed its plant. *Id.*, 107 S.Ct. at 2218. The facts of this case are not at all comparable to those in *Fort Halifax*. Petitioner quite clearly has in place an "employee benefits plan," and Respondent's suit is based on his claim that he was discharged based on Petitioner's desire to avoid payments to Respondent under that plan. Accordingly, the distinction drawn in *Fort Halifax* between "employee benefits" and "employee benefit plans" has no relevance to this suit.

CONCLUSION

The Texas law at issue in this case is clearly preempted by the express language of ERISA. Considerations of federalism do not counsel against a finding

of preemption in this case. Moreover, permitting Texas to give effect to its common-law cause of action in this case would undermine the careful balance struck by ERISA and thereby undermine ERISA's goal of encouraging the formation and retention of employee benefit plans.

Accordingly, WLF respectfully requests that the judgment of the Texas Supreme Court be reversed.

Respectfully submitted,

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